

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 18 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0108-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
STEVEN MICHAEL SPARKS JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2004136895001DT

Honorable Cari A. Harrison, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch

Phoenix
Attorneys for Respondent

Steven M. Sparks Jr.

Douglas
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 Petitioner Steven Sparks Jr. seeks review of the trial court's orders dismissing his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and denying his motion for rehearing. "We will not disturb a trial

court's ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Sparks has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Sparks was convicted of second-degree murder for having killed a woman in November 2004. The trial court sentenced Sparks to an aggravated, twenty-year prison term. In 2006 Sparks timely initiated his first proceeding for post-conviction relief, which ultimately was dismissed after appointed counsel filed a notice stating he could find no arguable issues and Sparks failed to file a supplemental pro se petition. In March 2011, Sparks again filed a notice of post-conviction relief, in which he indicated he was entitled to relief pursuant to Rule 32.1(e), (f), and (g). He referred in the notice to an attached pro se petition, but no such petition was attached and the court summarily dismissed the proceeding, concluding Sparks had failed to comply with the requirements of Rule 32.

¶3 Sparks filed a motion for rehearing, now attaching a copy of the pro se petition, which he averred he had provided to prison officials along with the notice. In his petition he claimed that (1) neither he nor counsel had been aware of our supreme court's ruling in *State v. Brown*, 212 Ariz. 225, 129 P.3d 947 (2006), a circumstance he characterized as a newly discovered material fact; and (2) he was unlawfully sentenced to an aggravated sentence in violation of the principles set forth in *Blakely v. Washington*, 542 U.S. 296 (2004), which he maintained entitled him to relief because *Blakely* was a significant change in the law. He argued that, although he had “waived all pertinent constitutional and appellate rights and entered a plea of guilty,” his plea agreement was

“silent as to any waiver of the jury trial on aggravating factors.” Sparks also asserted his of-right Rule 32 counsel had been ineffective for failing to raise a *Blakely* claim. Stating it had considered Sparks’s motion, the trial court denied the motion for rehearing.

¶4 On review, Sparks claims the trial court “refused to review” his petition “and instead denied the motion” for rehearing, thereby “fail[ing] to rule on the merits.” He asks this court to review his petition de novo. But, that the court denied his motion does not mean it had failed to consider his petition. Indeed, the court specifically stated it had considered his motion for rehearing which included the petition. And, as Sparks states in his petition for review, quoting *State v. Donald*, 198 Ariz. 406, ¶ 8, 10 P.3d 1193, 1198 (App. 2000), a trial court may summarily dismiss a petition ““if it determines that no material issue of fact or law would entitle the petitioner to relief.”” *See also* Ariz. R. Crim. P. 32.6(c).

¶5 The trial court here did not abuse its discretion in denying the motion for rehearing and summarily dismissing Sparks’s petition. Sparks’s *Blakely* claim was precluded by his failure to raise it in his first Rule 32 petition. *See* Ariz. R. Crim. P. 32.2(a)(3). The claim was not exempt from preclusion under Rule 32.2(b) because *Blakely* was decided before Sparks’s offense, guilty plea, and sentencing and, therefore, “did not effect a change of law as to [his] case.” *State v. Smith*, 169 Ariz. 243, 246, 818 P.2d 228, 231 (App. 1991). And, although as a pleading defendant Sparks could raise a claim that he had been provided ineffective assistance from his of-right Rule 32 counsel in a second post-conviction proceeding, *see State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995), any such claim fails because, contrary to his assertions,

Sparks expressly had waived his right to a jury trial on aggravating circumstances in his plea agreement. Sparks therefore has not established that the court abused its discretion and, therefore, although we grant the petition for review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge